IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 10, 2004 Session

DOLORES E. McNABB v. CHERYL L. GRAY, ET AL.

Appeal from the Circuit Court for McMinn County
Nos. 25016 & 25041 Lawrence H. Puckett, Judge

No. E2003-02674-COA-R3-CV - FILED SEPTEMBER 30, 2004

In these consolidated cases[1], the basic issue for resolution is whether a warranty deed from Dolores E. McNabb ("the Grantor") to Cheryl L. Gray and Joseph R. Evans, III ("the Grantees"), should be set aside. The trial court set the deed aside. The Grantees appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

D. Mitchell Bryant, Cleveland, Tennessee, for the appellants, Cheryl L. Gray and Joseph R. Evans, III.

Valerie A. Chastain, Athens, Tennessee, for the appellees, Dolores E. McNabb and Cynthia Brock.

OPINION

I.

The Grantor claims that she transferred the subject property to the Grantees for a consideration of $25,000, which she says has not been paid. She also claims that the warranty deed was to have reserved to her a life estate in the premises, which are described in the record as 205 County Road 179, Decatur. The warranty deed in the record – dated July 1, 2002, notarized July 2,

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[1] Cheryl L. Gray and her companion, Joseph R. Evans, III, filed a detainer warrant in the McMinn County General Sessions Court against Ms. Gray's sister, Cynthia Brock, seeking the removal of Ms. Brock and her mobile home from property described as 205 County Road 179 in Decatur. The judge of the general sessions court decided the detainer action in favor of Gray and Evans, and Brock appealed to the trial court. The detainer action was consolidated on appeal in the trial court with an original action brought by Ms. McNabb (who is the mother of Gray and Brock) against Gray and Evans.

2002, and filed in the Office of the Register of Deeds on July 3, 2002 – recites consideration of "[o]ne [d]ollar ($1.00) and other good and valuable consideration[]." There is no reservation of a life estate for the Grantor. The deed does contain the notarized signature of the Grantor to the following statement, which is required by Tenn. Code Ann. § 67-4-409(a)(6)(A) (2003):

> I, or we, hereby swear or affirm that the actual consideration for this transfer or value of the property transferred, whichever is greater is $21,000 which amount is equal to or greater than the amount which the property transferred would command at a fair voluntary sale.

(Underlining in original). At the top of the deed is a statement that the deed was prepared by an Athens attorney "for Sweetwater Valley Title Company on behalf of the Grantor[]."

The subject property is appraised at $21,000 for tax purposes.

II.

The trial court conducted a bench trial on June 16, 2003. It subsequently entered an order on October 16, 2003, *nunc pro tunc*, *i.e.*, the hearing date, in which it found

> that there is no meeting of the minds and that the deeds [sic] should be set aside in conformity with the memorandum opinion filed in this cause . . . .

The incorporated memorandum opinion, filed August 21, 2003, recites the following:

> The Court finds that there was no meeting of the minds between the parties as to the amount of consideration to be paid for the warranty deed and whether the deed contained an enforceable reservation of a life estate.
>
> The parties' duties toward one another are impossible to ascertain because no agreement was reached [i]n the above matters. Therefore, the deed ought to be, and hereby is, set aside and for nothing held.

III.

The Grantees present two issues for our review:

> 1. Did the trial court err in setting aside the warranty deed from [the Grantor] to [the Grantees]?

2. Did the trial court err in failing to require [the Grantor] to repay [the Grantees] $2,400.00 paid by them?

The Grantor, on the other hand, contends that the trial court could have rescinded the deed "because Cheryl Gray and Joseph Evans fraudulently misrepresented to Dolores McNabb that the Deed contained a reservation of a life estate and the provision for payment to Dolores McNabb of $25,000."

IV.

Since this is a bench trial, the record comes to us for a *de novo* review based on the record of the proceedings below, accompanied by a presumption that the trial court's factual findings are correct – a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). Our *de novo* review of the trial court's conclusions of law is not subject to a presumption of correctness. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

V.

A.

The Grantees first contend that the trial court erred in setting aside the warranty deed from the Grantor to them. We disagree.

The primary goal in contract interpretation is to ascertain and give effect to the intent of the parties. ***Guiliano v. Cleo***, 995 S.W.2d 88, 95 (Tenn. 1999). "Under general principles of contract law, a contract must result from a meeting of the minds of the parties in mutual assent to the terms." ***Sweeten v. Trade Envelopes, Inc.***, 938 S.W.2d 383, 386 (Tenn. 1996) (internal quotation marks omitted). Without a meeting of the minds, a contract cannot be valid. ***Higgins v. Oil, Chem. & Atomic Workers Int'l Union***, 811 S.W.2d 875, 879 (Tenn. 1991).

In the instant case, the parties elected to litigate upon their competing theories regarding the "understanding" that led to the execution of the deed.[2] At the hearing, both the Grantor and the Grantee Cheryl L. Gray testified in person, as did three other witnesses presented by the Grantor.

[2]In this appeal, the Grantees attempt to rely upon the defense of the statute of frauds. While this defense was asserted in the Grantees' answer and announced by them as a defense in opening argument, their approach at trial was different. Their position then was that there *was* an agreement between the parties but that their version of what occurred leading up to the execution of the deed was correct rather than the facts espoused by the Grantor. There was no objection made by the Grantees to the testimony presented by the Grantor and her witnesses as to what the terms of the agreement were. The Grantees' current position – that the statute of frauds precludes the Grantor from proving an agreement between the parties – is inconsistent with their position at trial. "It is the rule in this jurisdiction that a plaintiff cannot take a position on appeal inconsistent with that taken in the trial of the case." ***Daniels v. Combustion Eng'g, Inc.***, 583 S.W.2d 768, 770 (Tenn. Ct. App. 1978).

The Grantor testified that she was the owner of the subject piece of property and that she and her late husband had purchased it in 1993 for $11,000. The Grantor explained that, over the past few years, she had split her time between living in a mobile home on the property and residing with her sister in California. She also testified that for the past five or six years, the Grantees had lived in another mobile home on the property and that they had never paid the Grantor any rent. When questioned as to why she had never asked the Grantees to sign a rental contract, the Grantor explained that they had often complained about their financial situation, so she decided that she would just "let it ride" and not ask them for rent.

While the Grantor was living in California, Grantee Gray visited her mother, and the two discussed the Grantor's desire to deed the property to the Grantees. The Grantor testified that she was very specific in her statements to Grantee Gray that she wanted to reserve a life estate in the property and that she wanted the Grantees to pay her $25,000 for the property. She noted that, in approximately 1997, she had been offered $50,000 for the property.

The Grantor testified that, on the day she signed the deed, she did not read the deed before signing it because, in her words, "[the Grantees] said it was okay, and I trusted them." She went on to explain that she did not ask the Grantees to sign a promissory note because she trusted her daughter. When the Grantees filed a detainer warrant against Gray's sister to remove her from the property, the Grantor was served with a copy of the warrant as well. Upon being served, the Grantor stated that she requested a copy of the deed, and after receiving the deed, she learned for the first time that the deed did not contain a reservation of a life estate for her, nor did it contain any provision for the payment of $25,000. In addition, the Grantor pointed out that her name was misspelled on the deed, something she had not noticed until she received the deed from the Register of Deeds' Office.

Grantee Gray also testified, though her testimony was in sharp contrast to that of her mother. Gray testified that the Grantor told her she could have the property for $11,000, which is "what daddy paid for it." Gray further stated that the Grantor "could always live" on the property. With respect to the amount owed on the property, Gray testified that she and Evans had paid approximately $2,400 toward the $11,000 purchase price; however, the Grantor stated earlier that she believed the $2,400 to be the payment of back rent. Gray stated that the first time she ever learned about a rent obligation was when her mother testified at trial that the $2,400 was for rent.

Based upon all of the testimony, the trial court held that there was "no meeting of the minds between the parties as to the amount of consideration to be paid for the warranty deed and whether the deed contained an enforceable reservation of a life estate." The court concluded that it was "impossible to ascertain" the parties' duties to one another under the contract because an agreement was never actually reached and therefore, the court set aside the deed.

We do not find that the evidence preponderates against the trial court's finding that there was no meeting of the minds. From the testimony, it is clear that these parties had very different ideas as to their agreement. It is likewise apparent that the trial court found no evidence of fraud, but

rather found that both parties were credible. The trial court simply could not say what their true intentions were. As we have said many times, the trier of fact is in the best position to assess the credibility of witnesses; accordingly, such determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). With this in mind, we cannot say that the "preponderance of the evidence is otherwise." *See* Tenn. R. App. P. 13(d).

B.

Next, the Grantees assert that the trial court erred in failing to require the Grantor to repay the $2,400 paid by the Grantees to the Grantor. The Grantees contend that this $2,400 was payment toward the $11,000 they claimed they owed the Grantor for the property. The Grantor, on the other hand, argues that the $2,400 constituted a payment for back rent, as the Grantees had not paid any rent to her during the five to six years they had lived on the property.

In finding that the contract should be set aside, the trial court in this case made no finding as to whether the $2,400 should be repaid by the Grantor or whether that sum simply constituted the payment of rent. We therefore remand this case to the trial court for a determination of (1) whether the Grantees are entitled to a recovery against the Grantor and (2), if so, in what amount. *See* Tenn. Code Ann. § 27-3-128 (2000).

C.

The Grantor contends that the trial court could have rescinded the contract on the ground of fraudulent misrepresentation. Specifically, the Grantor argues that the Grantees told her that the deed reserved a life estate in the Grantor and that the deed contained a provision which obligated the Grantees to pay her $25,000.

Our review of the record reveals that the Grantor did not allege fraud in her complaint. It is well-settled that fraud must be specifically alleged by the party wishing to prove it. *See* Tenn. R. Civ. P. 9.02. Accordingly, we find the Grantor's issue to be without merit.

VI.

The Grantor filed a motion for frivolous appeal against the Grantees, which we reserved ruling upon, pending submission of this appeal on the merits. Upon consideration, we find the Grantor's motion is not well-taken and is, accordingly, denied.

VII.

The judgment of the trial court setting aside the deed from the Grantor to the Grantees is affirmed. As a consequence of that ruling, the detainer action is dismissed. All costs to date at the trial court level as well as the costs on appeal are taxed to the appellants, Cheryl L. Gray and Joseph

R. Evans, III. This case is remanded for such further proceedings as may be necessary, consistent with this opinion.

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CHARLES D. SUSANO, JR., JUDGE